

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1151098
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: GERONIMO GOTAY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1849

GERONIMO GOTAY

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 5 January 1971, an Examiner of the United States Coast Guard at San Francisco, California, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as a 3rd cook on board SS LONGVIEW VICTORY under authority of the document above captioned, Appellant:

- (1) On 24 November 1970, wrongfully assaulted a fellow crewmember with a dangerous weapon, to wit, a knife, while at Pono Point, P.I., and
- (2) On 16 October 1970, wrongfully failed to perform duties aboard the vessel at Subitc Bay, P.I.

At the hearing, Appellant did not appear. The Examiner entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of the master of the vessel and voyage records of LONGVIEW VICTORY.

There was no defense.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order revoking all documents issued to Appellant

The entire decision was served on 19 January 1971. Appeal was timely filed on 17 February 1971. Although Appellant had until 26 May to perfect his appeal, he has added nothing to his original statement.

FINDINGS OF FACT

On all dates in question, Appellant was serving as a 3rd cook on board SS LONGVIEW VICTORY and acting under authority of his document.

On 24 November 1970, when LONGVIEW VICTORY was at Pono Point, P.I., Appellant was observed by the master of the vessel, who was standing on the bridge of the vessel, heard a commotion on the after deck of the vessel, and saw Appellant chasing another member of the crew, one Morales, with a knife in his hand and shouting "I'll kill him! I'll kill him!"

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that

- (1) There was error in that the master of LONGVIEW VICTORY was not "a sober person;"
- (2) There was ethnic discrimination on the part of the master; and
- (3) The testimony of the alleged victim of the assault should have been presented to the Examiner since it would have been favorable to Appellant

APPEARANCE: Geronimo Gotay, per se.

OPINION

I

Appellant's argument that the master of LONGVIEW VICTORY was not "a sober person" merits no consideration. It is possible that cross-examination of the witness might have elicited some evidence that might have tended to discredit the eyewitness testimony given. If so, Appellant forfeited his opportunity to develop such evidence by his failure to appear for hearing. On the Appeal, Appellant's statement is not only too late but too broad; he does not even assert that a condition of insobriety existed at the time of the events to which the witness testified.

II

Appellant's assertion of ethnic discrimination by the master is supported by no foundation at all. Even if a foundation were suggested, the assertion is untimely; it should have been raised before the Examiner.

III

Appellant makes the argument that the testimony of the alleged victim should have been obtained at the hearing, in a belief that it would have been favorable to him as to the playfulness of Appellant's conduct. There are two reason why this argument must be rejected.

The first is the primary consideration that an offense of this kind may well be proved without the testimony of the alleged victim. The ultimate in assaultive offenses, murder, is usually proved without testimony of the victim except in the exceptional case of a dying declaration. The second is that if Appellant believed that the testimony of Morales would have been favorable to his cause he should have either asked the Investigating Officer to issue a subpoena to Morales and appeared at the hearing to present Morales as a witness or appeared at the hearing and asked the Examiner for a subpoena for Morales. Appellant's failure to do either means that he cannot complain of the lack of testimony from Morales.

V

Although Appellant does not raise the issue on appeal, I note that the official log book entry, upon which alone the Examiner relied for his finding that Appellant failed to perform duties on 10 October 1970, was neither made in substantial compliance with the applicable statutes nor made as a record kept in the regular course of business (since the entry for 10 October 1970 was, on the record, made after the entry for 24 November 1970). The failure to perform duties on 10 October 1970, questionably joined for hearing with a serious offense without even allegations of aggravating circumstances, must be dismissed as not proved.

V

The propriety of the order of revocation raises itself as an issue int the proceeding. Certainly the improperly found "failure to perform duties" on 10 October 1970 did not affect the order which, thus, must be predicated entirely on the serious offense found proved, the assault with a dangerous weapon. The table of average orders, 46 CFR 137, 20-265, indicates a six-month suspension for assault (without battery) with a dangerous weapon as a first offense. In this case the assault was a first offense. While Appellant's claim that failure to call Morales as a witness who might have been favorable to him is rejected as error, the failure to establish all the circumstances of the situation leaves no room to indulge in speculation as to what might have aggravated the matter so as to make revocation of Appellant's document

appropriate. In the absence of such a showing, the tabulated order is considered appropriate.

The order of the Examiner will be amended to provide for a suspension of six months. Since Appellant surrendered his document on 16 January 1971 and has not been granted a temporary document pending appeal, the order will provide for a suspension of six months beginning on 16 January 1971.

ORDER

The findings of the Examiner as to events of 10 October 1970 are SET ASIDE. The findings of the Examiner as to events of 24 November 1970 are AFFIRMED. The order of the Examiner is MODIFIED to provide for a suspension of Appellant's Seaman's documents for a period of six months, and as MODIFIED, is AFFIRMED. Since Appellant surrendered his Seaman's document on 16 January 1971, the suspension ordered runs from that date.

T.R. SARGENT
Acting

Signed at Washington, D. C. this 24th day of August 1971.

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